United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1370

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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CANDIDO MAYET, JR., :

Appellant, :

-against- : Docket No. 74-1370

UNITED STATES OF AMERICA, :

Appellee. :

- x

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLANT

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AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

QUESTIONS PRESENTED

1. Whether the Defendant's Due Process Rights were violated because the conviction was based on matters considered by the jury but which were not in evidence?

2. Whether the Defendant was denied his Sixth Amendment right to counsel since neither counsel nor Defendant was present when prejudicial and improper evidence was requested by the jury during its deliberations?

3. Whether it was reversible error for the court below to instruct the jury after the verdict not to discuss with anyone what occurred in the jury room?

4. Whether the Defendant's Due Process Rights were violated because all material government witnesses were under coercion to testify unfavorably against the Defendant?

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York rendered December 11, 1973, wherein, after a trial before Hon. Inzer B. Wyatt and a jury, Appellant Mr. Mayet was convicted of violating Sections 812 and 814A of Title 21, United States Code, conspiracy to violate federal narcotics laws and distribution or possession with intent to distribute narcotic drugs. On June 7, 1974 this Court granted appellant's petition to proceed in forma pauperis and assigned Haliburton Fales as counsel on the appeal.*

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* Reference by the letter "TR" are to pages of the Supplemental Index to the Record of Appeal filed with this Court. This appeal will be heard on the original record.

STATEMENT OF FACTS

A. Prior to Trial

Mr. Candido Mayet, Jr., an educated man of Cuban extraction, (TR. 565-7), successfully operated a shoe factory and shoestore in New Jersey in cooperation with his father, (TR. at 565). Harry Shapiro was an employee and friend of defendant, (TR. at 569 & 600). Shapiro agreed to sell cocaine to Susan Marcus and did sell cocaine to Marcus in the back of defendant's store and in presence of defendant, who took no active part in the sale, but who had, at times, used cocaine. (TR. at 610-612). Marcus charged that Mr. Mayet brought the cocaine to this party (TR. at 116-117, but see TR. 144).

Shapiro later agreed to sell cocaine to Bruce Roth and Gregory Karniloff, the latter being a federal agent, (TR. 208-210). On the day of sale, Mr. Mayet went into New York City on business and offered Shapiro a ride into the city, (TR. at 570). While Shapiro went to a clothes showroom to meet Roth, Mr. Mayet waited in the hall, (TR. at 573). While Shapiro and Roth were discussing the sale, Mr. Mayet went to a restaurant below the showroom for lunch, (TR. at 573). After Roth and Shapiro contacted Karniloff by phone, (TR. 224 to

227), they entered the restaurant and persuaded Mr. Mayet to go with them to a diner where Shapiro and Roth intended to meet Karniloff, (TR. at 574). When they got to the diner, Mr. Mayet remained on the corner outside the diner and told Shapiro he would wait five minutes before proceeding on the business which had originally brought him into New York, (TR. at 574). Shapiro and Roth entered the diner, met Karniloff, and Shapiro was subsequently arrested in the basement restroom of the diner for the sale of illegal drugs, (TR. at 235-236). In the interim, Mr. Mayet had become impatient, hailed a cab, and proceeded to his father's place of business in order to conduct his planned business, (TR. at 374). Mr. Mayet was arrested two days later, on the say-so of Shapiro who, for reasons developed below, had implicated him in the sale, (TR. at 576).

B. <u>At Trial</u>

The only witnesses produced at trial against the defendant who were competent to testify about his alleged participation in the crime were under some type of government coercion. This coercion took several forms. Either sentencing, resentencing or indictment hung over the heads of each of these witnesses, (TR. at

57, 60-61, 99, 135, 136, 181, 249, 250, 252, 254, 292-94, 331-339, 363-364, 385, 393, 425-427, 430, 671-672).

Evidence was improperly submitted to the jury, (TR. 447-448, 259, 774-777). A handbag and keys it contained were submitted into evidence. The other contents, not so admitted, were also exhibited to the jury and discussed by the prosecution.

With the court's permission, the defendant's counsel absented himself from the proceedings, (TR. at 771-772). He was not present when the jury sought inadmissible evidence during its deliberations, (TR. at 774). The defendant was never queried as to whether he agreed to such procedures and the court never discussed the possibility of a conflict of interest with the co-defendants or attorneys, (TR. at 771-772). Proper instructions concerning the discussed and exhibited but unadmitted evidence were not given to the jury.

After the verdict, the Judge instructed the jury not to discuss with anyone what occurred in the jury room. (TR. at 779).

During the trial, the defendant took the stand in his own behalf. He testified fully to all events and maintained his innocence. He was fully cross-examined, but remained steadfast in his assertion that he had no

part in any of the illegal activities, (TR. at 564-634).

The defendant was convicted on December 11, 1973 and was sentenced on February 1, 1974.

POINT I

THE CONVICTION SHOULD BE SET ASIDE BECAUSE IT WAS BASED ON MATTERS NOT IN EVIDENCE CONSIDERED BY THE JURY IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS.

At the trial, a handbag and the keys it contained were properly received into evidence, (TR. at 447 and 448). The handbag also contained many other items, including such women's possessions as: hair brushes, lipstick, a bracelet, a ring, and stockings. These were also displayed to the jury and discussed during trial, but were never received as evidence, (TR. at 259 and 774-775). The incorrectness of this procedure and the importance to the jury of these items not in evidence is brought out by the following colloquy:

"(3:10 p.m., a note was received from the jury.)

THE COURT: Mr. Willis, I notice that the defendants are not here. Do you have any idea where they are?

MR. WILLIS: (Defense attorney for Aguilar): I think they may be, only by way of the clerk, down at the Chesimard trial on the third floor. However, to expedite this matter, I would ask the

Court to voluntarily, on my representation, that if it is merely a question of wanting a piece of evidence already marked in the presence of the defendants, I would ask the Court to allow the jury such evidence in the absence of the defendant but counsel being present.

THE COURT: The note says. May we please have the handbag and contents.

MR. BUCHWALD: (Asst. U.S. Attorney): This is Government Exhibit 3. Only the handbag itself was marked and admitted and the only contents that were admitted were the keys. It is my recollection that there has been testimony as to what the other contents were. I believe that came in the form of both cross-examination by Mr. Willis of Agent Karniloff and I believe that there was--

THE COURT: What was this dramatic effect that you produced or somebody produced by dumping all the contents in front of the witness?

MR. WILLIS: I don't believe that was me.

THE COURT: Who did it? All the contents were dumped out and somebody said, Have you ever seen Shapiro with a bracelet? And the bracelet was held up.

MR. WILLIS: That was not me.

MR. BUCHWALD (The Prosecutor): I believe that was me.

THE COURT: How were you able to use that which was not even in evidence? You mean because there was simply no objection?

MR. BUCHWALD: Yes, your Honor. The pocketbook was marked and I suppose at the time it was marked and entered there was some ambiguity as to whether the contents were included.

THE COURT: Just a sloppy way of proceeding. What is in evidence then?

MR. WILLIS: The pocketbook and the keys, your Honor.

MR. BUCHWALD: The pocketbook, the keys, the cocaine, the price list and the chemist's stipulation.

THE COURT: Am I correct it is just sloppiness?

MR. WILLIS: Yes.

THE COURT: It is just sloppiness, is that it?

MR. BUCHWALD: I would concur that that was not the best way for us to proceed.

THE COURT: All right. Then the handbag is what exhibit?

MR. BUCHWALD: Government Exhibit 3, your Honor.

THE COURT: And the keys?

MR. BUCHWALD: 5, your Honor.

MR. WILLIS: Do they want the handbag and the keys, or just the handbag?

THE COURT: Handbag and contents. Weren't the contents displayed to the jury?

MR. WILLIS: There was, and I would object now. The only thing that I thought was relevant and was being marked into evidence was the handbag itself and specifically the keys that were taken out of the handbag. There may have been reference to a bracelet. I think I saw at one time a pair of stockings, other things in there, but it was never gone through. I am of the opinion that we are dealing with the pocketbook itself and the keys.

THE COURT: The jury wants to see the handbag and the contents and I can't send them anything which is not in evidence. I take it you both agree that nothing is in evidence but the handbag and the keys.

MR. WILLIS: Correct.

THE COURT: That is why this is such a lousy job, absolutely impossible to deal with. If I send them something which is not in evidence, then a conviction is reversed. On the other hand, although the contents have been freely displayed to the jury and testimony about it, apparently the contents are not in evidence.

MR. WILLIS: I apologize, but I didn't offer anything into evidence.

THE COURT: No, it is just sloppiness but that is the fate of mankind.

My note to them reads, 'The handbag, Exhibit 3, and the keys therein, Exhibit 5, are sent herewith. The other contents, while displayed in court and testimony taken as to them, were not received in evidence and therefore may not be sent to the jury.'

Do you have Exhibit 3 and 5?

MR. BUCHWALD: Yes, sir.

No request was made and no instruction given, at this point, as counsel for Mr. Mayet should surely have insisted, that what was not in evidence, not only 'may not be sent to the jury' but could not be considered by them.

THE COURT: I have dictated the note and my reply to the reporter so even if we don't get it back it is now a matter of record.

(At 4:40 p.m., a note was received from the jury).

THE COURT: We have a note, I am told.

It says, 'We have reached a decision'." (TR. at 774-777).

The importance of the handbag and contents to the jury is shown by the rapid rendering of a decision after their request for the handbag and contents. It

is significant that the jury did not request any other piece of evidence during its deliberations. The defendant was prejudiced by this improper reference to matters not in evidence and their consideration by the jury.

The rule that matters not in evidence are not to be observed or considered by the jury is a fundamental maxim of our system of jurisprudence. McCormick begins his chapter on the admission and exclusion of evidence with a statement of the rule.

> "At the outset, it should be noted that our adversary system imposes on the parties the burden of presenting evidence at the trial pursuant to rules and practices that make it clear when proof has been presented so that it is officially introduced and thereupon can be considered by the trier of fact in the resolution of fact issues." McCormick, Handbook on Evidence (1972).

The importance of the rule has been recognized by this court. Relying on Parker v. Gladen, 385 U.S. 363 (1966), Remmer v. United States, 347 US. 227 (1954), and Estes v. Texas, 381 U.S. 532 (1965), Judge Friendly has held that where jurors consider extra-record facts in the course of their deliberations, there is such a probability that prejudice results that the verdict must be deemed inherently lacking in due process; United States v. McMann, 435 F.2d 813 (2d Cir. 1970). In McMann, jurors considered extra record information in finding a defendant

guilty of grand larceny. Here, as there, "the nature of what has infiltrated and the probability of prejudice", (at 818), requires a reversal. The contents of the handbag had been an improper feature of the summation by the prosecution against Mr. Mayet. (TR. at 731).

POINT II

THE DEFENDANT WAS EFFECTIVELY DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL SINCE NEITHER COUNSEL NOR DEFENDANT WAS PRESENT WHEN PREJUDICIAL AND IMPROPER EVIDENCE WAS REQUESTED BY THE JURY DURING ITS DELIBERATIONS.

The prejudicial and improper evidence discussed in Point I also plays a part in the violation of defendant's Sixth Amendment rights. The court improperly and harmfully permitted defendant's counsel to be absent at a stage of the trial during which the court had reason to believe counsel might well be required.

> "THE COURT: The jury writes notes all the time and I have an idea that one of the jurors is going to want that bag", (TR. at 773).

Furthermore, the court permitted the co-defendants counsel to "represent" defendant, even though such "representation" was likely to be inadequate because of the inherent conflict of interest between co-defendants in a conspiracy case. Neither defendant nor his counsel were queried

about the possibility of a conflict of interest or the ability of co-defendant's counsel to adequately represent defendant.

All these circumstances are represented by the following interchange between the court and counsel. Moreover, the court did not inquire about defendant's feelings regarding the change in counsel.

> "MR. STONE (Defendant's Counsel): I don't know your procedure or practice if they want an exhibit giving it or not without calling attorneys down.
>
> THE COURT: I don't like to do that, Mr. Stone. Sometimes there is a question about the note. If I once violate the principles I never know when to stop. I appreciate your confidence but I much prefer to do it with counsel present.
>
> MR. STONE: Your Honor, in the line of a note, do you think one counsel can cover for both?
>
> MR. WILLIS: (Co-defendant's counsel): I am a little in limbo. I am going to have to stick around the building for most of the day.
>
> THE COURT: If you state on the record and it is all right with Mr. Mayet for Mr. Willis, in connection with a note, to cover for you, it is all right with me.
>
> MR. STONE: I think it would certainly, <u>if it was a simple note</u>, I could get something done. The 17th floor is urging that I finish something immediately. (emphasis added).
>
> MR. WILLIS: I will stay after lunch.
>
> THE COURT: I will, too.

MR. STONE: I'll be five minutes away. If it is a simple note he can cover. If not, I can run right back.

THE COURT: We will permit Mr. Willis to cover for you, Mr. Stone, unless Mr. Willis thinks he has to get you.

MR. BUCHWALD: It is your desire that we return to the courtroom after lunch, or can we wait in our rooms in the courtroom and leave a phone number?

THE COURT: I don't really know these details.

MR. WILLIS: Just as a suggestion, Mr. Stone is going to be in his office.

THE COURT: We won't call Mr. Stone."

The court in an otherwise commendable desire to be courteous thus relieved counsel of his duty even beyond his request and abdicated the control which the court should at all times maintain.

The landmark decision in this area is Glasser v. U.S. 315 U.S. 60 (1941), which concerned a conspiracy to defraud the government. The court eloquently laid out the fundamental considerations in this area.

"Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.

To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Steward as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its

> denial. Cf. Snyder v. Massachusetts, 291 U.S. 97, 116; Tumey v. Ohio, 273 U.S. 510, 535; Patton v. United States, 281 U.S. 276, 292. And see McCandless v. United States, 298 U.S. 342, 347. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the records leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser." (at 75-76).

Under Glasser, the courts have stressed the near unwaivability of the right, especially when such waiver is undertaken by counsel and not the defendant. In a housebreaking case, the District of Columbia Circuit spelled out the nature of the defendant's right.

> "When two or more defendants are represented by a single counsel, the District Court has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it.

> The Supreme Court has stressed the importance of having separate counsel representing co-defendants where their interests may not coincide. Glasser v. United States, 315 U.S. 69, 71, 62 S.Ct. 457, 86 L.Ed. 680 (1942). In our opinions we have suggested that co-defendants are 'entitled to be represented by separate counsel * * * [if] there was some inconsistency in joint representation.' Lebron v. United States, 97 U.S.A. pp.D.C. 133, 137, 229 F.2d 16, 20 (1955), cert. denied, 351, U.S. 974, 76 S.Ct. 1035, 100 L.Ed. 1492 (1956). We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest. Wynn v. United States, 107 U.S. App. D.C. 190, 191, 275, F.2d 648, 649 (1960). And the Supreme Court has stated that the trial judge bears 'the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused,' specifically the right to effective assistance of counsel, Glasser v. United States, 315 U.S. at 71, 62 S.Ct. at 464. The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or had advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney', Campbell v. United States, 352 F.2d 359, 360 (D.C. Cir. 1965).

The degree of adoption of Campbell by this Circuit is as of yet undetermined, but Judge Feinberg has explicitly required in such cases that counsel must be interrogated as to possible conflicts of interests; United States v. Armone, 363 F.2d 385 (2d Cir.), cert. denied, 385 U.S. 957 (1966),

"Viscardi relies upon Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965). Nothing in Glasser requires the government or the court to take further steps after receiving such as assurance from an officer of the court. In Campbell, where a single attorney was retained by two defendants, the court reversed the conviction of one defendant because the trial judge did not inquire into whether the defendants knowingly accepted the risk of sharing defense counsel. We need not now decide how much of the Campbell case we accept as law in this circuit. We simply hold that the trial judge's inquiry of counsel as to possible conflict of interest in this case suffered to protect any rights Viscardi may have had in the matter" (at 406).

Such an attitude was reinforced and extended in Morgan v. The United States, 396 F.2d 110 (2d Cir. 1968), a Mann Act conspiracy. In perhaps the leading Second Circuit case on the matter, Chief Judge Lumbard stated:

"This case makes it abundantly clear that district courts should exercise extreme care before the court assigns any counsel already representing a defendant to represent one or more other defendants who face the same charges. Despite what the appearances may be before trial, the possibility of a conflict of interest between two defendants is almost always present to some degree even if it be only in such minor matter as the manner in which their defense is presented.

We do not suggest that prejudice must necessarily have resulted where counsel already representing one defendant was assigned to represent another co-defendant. Nor do we suggest that a trial judge may never appoint the same attorney to represent two or more defendants.

But we do take this occasion to emphasize that the assignment of counsel in multi-defendant cases should never be a routine matter and should

> never depend upon the counsel who are immediately available. Where the trial judge assigns the same attorney to represent two or more defendants, he should do so only after conducting the most careful inquiry, as to which a full record should be made, and after satisfying himself that no conflict of interest is likely to result and that the parties involved have no valid objection." (at 114).

Here too the court assigned counsel already representing a defendant to represent another defendant facing the same charges. But here there was no "careful inquiry" as to conflicts of interest or the feelings of the defendant about the change in counsel. In accord, United States v. Sheiner, 410 F.2d 337, 342 (2d Cir. 1969); United States v. McMann, 386 F.2d 611 2d Cir. 1967), cert. denied, 390 U.S. 958 (1968); Olshen v. McMann, 378 F.2d 993, 994-995 (2d Cir.), cert. denied, 389 U.S. 874 (1967). Even though it is not necessary that defendant suffered actual prejudice for reversal, actual prejudice in this case is proven by the record. As discussed in POINT I, matters not in evidence were apparently being considered by the jury. It was at this time of impropriety that defendant was denied his right to counsel. When defendant most needed effective representation, the court permitted his counsel to leave defendant unrepresented.

POINT III

IT WAS REVERSIBLE ERROR FOR THE COURT BELOW TO INSTRUCT THE JURY AFTER THE VERDICT NOT TO DISCUSS WITH ANYONE WHAT OCCURRED IN THE JURY ROOM

After the jury rendered their verdict and were polled, the judge below delivered the following instruction:

> "Second, while I have no reason to suppose that anybody will ever inquire as to what took place in the jury room and while this is a country of free speech and I don't make any order in the premises, I believe it is a sound principle that what takes place in the jury room when jurors are deliberating is a matter for the jurors themselves and should anybody ever inquire as to what took place in the jury room, I suggest that it is a wise decision in the light of the principles that I suggest not to reply. If you want to cite my suggestion you may feel free to do so. As I say, I have no reason to suppose that anybody will ever inquire, but I usually make this suggestion to juries." (TR. at 770).

The leading case on the propriety of post-verdict investigation of jurors is Mattox v. United States, 146 U.S. 140 (1892). In that case, the Court held there was reviewable and reversible error on the part of the trial court in refusing, on defendant's motion for a new trial, to consider affidavits of jurors offered to prove that a newspaper was injected into the jury room containing comments prejudicial to the defendant. Mattox inherently confirms the right of the defendant to question and interrogate jurors on possible misbehavior or improper procedure. This field has been clouded with the

confusion between the interrogation of jurors as to their state of mind or mental processes and the interrogation of jurors as to misbehavior or improper procedure. The distinction is an important one and should not be forgotten. See Rees v. Peyton, 341 F.2d 859, 864-865 (4th Cir. 1965).

The vast majority of cases concern the questioning of jurors about their mental processes. Even in this sacrosanct area, the courts refuse to lay down an inflexible rule; Mattox v. United States, (supra); McDonald v. Pless, 238 U.S. 264, 268-269 (1914); United States v. McMann, 435 F.2d 813, 819 (2d Cir. 1970); United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974).

But considering the separate distinct question of post-verdict interrogation of jurors as to misbehavior or improper procedure, the courts faced with the problem have uniformly agreed that the defendant has an unencumbered right to conduct such questioning. The Second Circuit has not, so far as we are aware, been presented with a recorded case which squarely confronts that narrow issue, but the issue was well discussed by the Fourth Circuit in the grand larceny case of Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971). Judge Bryan stated:

> "The State urges that jury deliberations are wrapped in a mantle of privilege and jurors cannot be called to impeach their verdict. In controversy here, however, is not the nature of the mental processes of each juror in reaching the verdict, nor is it proposed that jurors testify as to their impression of the impact of particular evidence on the deliberations. United States v. McKinney, 429 F.2d 1019, 1029, 1030 (5th Cir. 1970); cf. Mattox v. United States, 146 U.S. 140, 147-51, 13 S.Ct. 50, 36 L.Ed. 917 (1892); United States v. Beach, 296 F.2d 153, 160 (4th Cir. 1961); Rakes v. United States, 169 F.2d 739, 745-756 (4th Cir. 1948), cert. denied, 335 U.S. 826, 69 S.Ct. 51, 93, L.Ed. 380 (1948); Young v. United States, 163 F.2d 187 (10th Cir. 1947), cert. denied, 332 U.S. 770, 68 S.Ct. 83, 92 L.Ed. 355 (1947). Petitioner's challenge raises only the question of whether events not adduced in evidence were talked about in the jury room. This is a determination which can be made without calling jurors to give evidence on their evaluation of the proof. Such a factual inquiry is sanctioned in Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965). There, it is stated that a juror may after verdict be queried as to information, whether documentary or oral in nature, introduced into the jury room but not put before them at trial. Id. at 865." (at 239).

Other courts which have been forced to face the problem are in accord; United States v. Rocks, 339 F.Supp. 249 (E.D. Va. 1972); United States v. Tobe, 352 F.Supp. 218 (N.D. Ill. 1972).

Although not a prerequisite for reversal, the deprivation of defendant's right to question jurors after the verdict resulted in actual prejudice in the present case. As set forth in POINT I and POINT II, improper evidence was put before the jury and defendant was

deprived of counsel at the time when the jury inquired about what had been earlier put before them. The judge then deprived defendant of this right to question jurors concerning what evidence was relied upon in the jury room. United States v. McMann, 435 F.2d 813 (2d Cir. 1970), discussed earlier in POINT I, dealt with the improper submission of evidence and the propriety of post-verdict questioning of jurors. Judge Friendly stated that he believed the proper rule to be that

> "a juryman may testify to any facts bearing upon the question of any extraneous influence, although not as to how far that influence operated upon his mind, with 'extraneous' including misconduct by the jurors themselves." (at 809-810).

Therefore, deprivation of defendant's right to post-verdict questioning, especially necessary in light of the admittedly sloppy procedures employed below, is reversible error.

POINT IV

THE CONVICTION SHOULD BE SET ASIDE AS DEFENDANT WAS DENIED DUE PROCESS BECAUSE ALL MATERIAL GOVERNMENT WITNESSES WERE UNDER COERCION TO TESTIFY UNFAVORABLY AGAINST DEFENDANT

Apart from the testimony of governmental agents, the government's case rested on the testimony of witnesses Lorber, Roth, Marcus, Kelly and Shapiro. As the government

agents were incompetent to testify about the defendant's actions prior to arrest, the defendant was convicted solely on the basis of those five witnesses. In each case, as shown by the colloquies below, the witnesses were under some type of government coercion.

Lorber and Roth had been arrested and convicted on drug charges in 1972. They set about to snare someone else in a drug scheme so as to make their sentencing less severe. Referring to such plans, Lorber was asked:

> "Q. Had you entered into an oral agreement or some discussion concerning your cooperation?
>
> A. We didn't agree on anything. They just stated that they couldn't give me anything if I helped them, they could only possibly help my case but they wouldn't guaranty me anything period. We didn't enter into an agreement.
>
> Q. They couldn't guaranty you, but it might help your case, correct?
>
> A. They said it wouldn't hurt. They didn't say it would help. It wouldn't hurt. They couldn't guaranty it would get me off, or that it would make my sentence any less." (TR. at 57).

When asked the time of his original sentencing, Lorber replied:

> "A. I believe it was August 19.
>
> Q. Of this year?
>
> A. That is right.

Q. After the defendants in this indictment had been indicted?

A. Yes.

Q. Was that after you had testified before the grand jury?

A. I think so." (TR. at 60-61).

Lorber was asked about his plans to catch other drug offenders:

"Q. You called the FBI, the Federal Bureau of Drugs rather, to inform them that you had information concerning drugs, is that right?

A. Right.

Q. No promises were made to you by any Federal Agency?

A. That is right.

Q. But you were told, correct me if I am wrong, that it wouldn't hurt you?

A. That is right.

Q. You then took it upon yourself to continue meeting with Mr. Shapiro and Kelly, as the case may be?

A. Correct."

Lorber would be eligible for resentencing on December 18, 1974, a week after defendant's trial would end. He admitted he was aware of this fact (TR. at 71). When asked,

"Do you expect by coming here today, you are going to shorten your prison term, yes or no?" Lorber replied "I hope it might help me." (TR. at 99).

Marcus admitted that she was a purchaser of illegal drugs and that she feared indictment. The following colloquy brings out this point. On cross examination, Marcus stated:

"Q. Have you been indicted?

A. No, I have not.

Q. Has your lawyer advised you that you may be indicted?

A. Yes, that I may be.

Q. Are you coming here to testify to avoid or attempt to avoid indictment?

A. Yes, absolutely." (TR. at 135-136).

Shapiro had been indicted with the defendant, but had pleaded guilty to the charges. As of the time of trial, Shapiro had not be sentenced. He was due to be sentenced December 14, 1973, three days after the end of defendant's trial. At that time, Shapiro would be sentenced by the judge in defendant's case and sentence recommendations would be made by the prosecutor in defendant's case, (TR. at 364 and 561). At the time of defendant's trial, Shapiro's sentencing had deliberately been delayed until after his testimony before these very people. The following transcript excerpts bring out the flavor of coercion present.

"Q. Have you previously entered a plea in the case?

A. Yes.

Q. What was that plea?

A. Guilty.

Q. Have you been sentenced as of yet?

A. No.

Q. When are you to be sentenced?

A. The 14th of December.

Q. 1973?

A. Right.

Q. Has any member of the United States attorney's office indicated that any statements would be made by the Government as a result of your testimony this morning?

A. Yes.

Q. What statements are those?

A. They just said they would tell the judge I cooperated." (TR. at 181).

"Q. And didn't the Government agents tell you that if you helped them, they will help you?

A. Yes.

Q. Isn't that a fact?

A. Yes." (TR. at 249).

"Q. They wouldn't help you or offer to help you meet bail so you could go out with the other people and socialize? Didn't they say something to you about not having to sit in jail for a long period of time?

A. They said they would try to help me get out.

Q. And with that in the back of your mind, their assistance to get out of the federal penitentiary, you talked to them?

A. Yes.

Q. And you told them everything you could to help yourself; correct?

A. Yes." (TR. at 250).

"Q. And you wanted to convince the Government, in particular the Federal Bureau of Narcotics, that you were a good guy; am I right?

A. Yes.

Q. And the best way to convince them that you were a good guy was to give them other names; correct?

A. Yes.

Q. Give them as much material as you could possibly give them?

A. Yes." (TR. at 252).

"Q. Mr. Shapiro, what did the Government tell you about yourself? I am hard of hearing so would you please talk as loud as you can.

A. They told me I was a patsy. I was a fall guy.

Q. patsy and a fall guy; correct?

Q. Before you go any further, what does a 'patsy' mean?

A. A sap.

Q. 'A fall guy' means what?

A. A guy who gets all -- gets everything.

Q. I can't hear you.

A. The guy who takes the whole rap.

Q. Did they suggest that you shouldn't take the whole rap?

A. Yes." (TR. at 254).

"Q. Did the Government speak up on your behalf when you applied for bail? Did they tell the judge you had cooperated?

A. Yes.

Q. Is that one of the reasons you cooperated, to get out?

A. Yes." (TR. at 292).

"Q. I want you to tell the jury the conversation, or conversations, that you had with the Government concerning your sentencing on December 14 of this month.

A. I was told that they would just advise the sentencing judge that I had cooperated.

Q. Did they tell you that the more you cooperated the better it would be?

A. Yes.

Q. Did you meet with the Government to go over your testimony?

A. Yes." (TR. at 293-294).

"Q. You have stated, have you not, that you pleaded guilty in this case?

A. Yes.

Time pressures with which we are familiar even caused the trial court to hasten cross examination and reveal impatience with bringing out this telling point.

THE COURT: Yes, he has. Do we need to repeat that? Everybody knows he has pleaded guilty. He said it at least six times. There has got to be a limit to this trial.

Get on with it.

Q. Do you know who the judge is who will sentence you?

THE COURT: Yes, I am the judge. We know that. I said that." (TR. 363-364).

There is also some doubt as to when Shapiro decided to implicate the defendant after Shapiro's own arrest, (TR. at 337-339). Shapiro did not immediately decide to cooperate. Such cooperation occurred only after the government aided Shapiro in securing bail and informed him of the benefits of possible "cooperation".

Roth, having been arrested and convicted with Lorber, was due for resentencing within a month after the end of defendant's trial. Like Lorber, his testimony was also colored by the specter of resentencing, (TR. at 385). He admitted he was brought from Missouri to New York without being informed of the reason, only to discover the trip was solely for the purpose of his testifying in defendant's case, (TR. at 393-394). Roth also admitted that after his first arrest he agreed to cooperate with the government in order to help himself, (TR. at 395-396, 426-427). He further admitted that the

government repeatedly requested that he introduce agents to someone for the purpose of their purchasing drugs, (TR. at 425-426). The government fulfilled its promises and made favorable statements on Roth's behalf when he was first sentenced, (TR. at 430).

Kelly, like Shapiro, was also indicted with defendant and pleaded guilty. He too, was scheduled for sentencing within a month from the end of defendant's trial, (TR. at 671). The judge and prosecutor were the same as those at defendant's trial and before whom Kelly was now testifying. Kelly also admitted that he expected the U.S. Attorney to speak favorably to the sentencing judge about his cooperation, (TR. at 672).

In sum, the entire government case consisted of testimony from witnesses who faced indictment or sentencing by the very judge and prosecutor in defendant's case. The unwarranted and deliberate delay by the government in postponing sentencing of co-conspirators and witnesses effectively deprived the defendant of due process of law. The government also violated Federal Rule of Criminal Procedure 32 in that the imposition of sentences was unreasonably delayed. While it may or may not lie in the mouth of defendant to raise the lack of due process to others as contemplated by Rule 32, it

is not beyond the competence of this court to recognize that the policy behind the Rule no doubt includes the avoidance of the very sort of situation which the record indicates was carried to extremes in this case. The Court and the prosecutor may have hearts and intentions as pure as the driven snow and may only be seeking to insure that witnesses do not deviate from what they officially conceive to be the truth, but how can the witness know this?

While sentencing should be for the large part discretionary, such discretion should not be abused. Defendant submits that sentencing of virtually all of the witnesses by the same judge and prosecutor who is conducting the case in which the witness testifies violates due process. The possibility for abuse and coercion inherently present are too great to sanction. The fundamental fairness of defendant's trial is jeopardized beyond redemption. The state has too many advantages to allow it still another. Sentences should rarely, if ever, be postponed pending another's trial. This uniform and consistent coercion of all the material witnesses against defendant made it impossible for defendant to secure a fair trial.

CONCLUSION

For the reasons stated above, the decision of the trial court should be reversed.

Respectfully submitted,

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